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Panel Discussion

SESSION FOUR

PANEL DISCUSSION

The comments made by the speakers are their own personal remarks and do not necessarily represent the official view of any organization or agency they represent.

MR. JOHN MARTIN* (Chairman): Before the proceedings are open to the floor for discussion, I would like to comment on the Tydings Bill. Although I have formidable opposition in the ABA, I have been one of the ones in favor of it because it seems that with the 1407 we are committed to something which is not as workable as the Tydings Bill. It is my opinion that we are putting our heads in the sand if we deny that something isn't going to be done. Although we have the 1407, it was not needed, and it is useless. Furthermore, it is causing considerable confusion, and it is not solving any uniformity problems. Speaking as a representative of air carriers and their insurers, whether or not there are 50 cases or one case in a location, if we recognize that there is liability, there is a reason when an airplane does not stay in the air. We don't need a judge, a jury, or the Supreme Court to tell us that. Thus, we are prepared to settle at reasonable prices. For example, those involved in the Dawson City accident recognize that we have settled perhaps 90 per cent of the cases, and 80 per cent were probably settled within a year of the accident. As you also know, we tried to pay top dollar. After listening to John Hill, however, you can see why we are so afraid.

The problem arises, of course, in the troublesome cases where there are conflicting questions, where there are many defendants, and where the accident itself is perhaps a mystery. In these cases we need uniformity. We need a place where all the defendants can be brought together and where there can be some "head-knocking" among the recalcitrant defendants. In this regard, some people are becoming wiser. For instance, the government is now a partner. Manufacturers are beginning to learn that they can be trapped as well as an air carrier. It takes some effort, however, and I think it takes a concept like the Tydings Bill to provide the impetus. Perhaps a year is too short for a suit, but the basic concept of uniformity, and a place where everyone can be in one spot is sound. Nor does the location necessarily have to be New York. The most gratuitious place is the place of the accident and let the chips fall where they may. The case will obtain a certain group of attorneys anyway, no matter where they are located. Therefore, I think we are hiding our heads if we fight the Tydings Bill. It is better to have something we can live with than to allow legislators or judges to throw something at us and then shove it down our throats which can have painful consequences.

MR. C. O. MILLER: There are two or three points that came up that need to be clarified. For example, concerning the FAA delegated actions, i.e., actions that are delegated to the FAA for the fact-finding portion, to the first degree of approximation it's right. These cases, which are a matter of the non-fatal general aviation cases as compared to the fatal general aviation cases and certainly involve all air carriers and air taxi, are handled without question. There are a

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few odd-ball situations, however, like experimental aircraft or air show type activities that, even if someone is killed, the FAA handles the fact-finding portion by the existing delegation. What I want to stress, however, is that even though the Board performs a fact-finding function, the report goes through at least two separate reviews, plus determinations of probable cause by the Board. Also, it can and occasionally does happen that we withdraw or take back one of these so-called delegated accidents. This withdrawal would usually happen if, for example, an experimental aircraft ran into an apartment building and there are a lot of fatalities or ground damage. We would take the case back under these conditions and handle it just like any other major investigation, although the FAA might investigate under the existing "agreement."

Second, a question came up earlier about maintaining or keeping the wreckage or its critical parts for an extended period of time so that all potential litigants might have a chance to examine it. This is a very fine idea. There is one major drawback, however; who will pay for the storage and upkeep during this period of time? If anyone has any concrete suggestions in this area, we'd be very receptive to them because we certainly have no intention of establishing a program which allows this material to be prematurely destroyed.

The third point concerns materials in our files that had particular reference to the computerized data. In the past six years there have been very significant improvements to this data. We can and do make computer runs monthly, quarterly, annually, special studies and so forth. There is a lot more already in existence in terms of identifying certain kinds of accidents, and identifying the related data. It is certainly a lot easier for us, and for you to a great extent, if computerized data is available, and there is someone in Washington who stops by; it's much more expeditious and I think cheaper in the long run. In any event, the comment was made earlier that we have made data of this kind available to manufacturers and others. That's true. As a matter of fact, tapes of our computed data have been and will be made available to organizations if they want them at a relatively small cost. In other words, in theory, someone could buy our tapes once a year and do their own accident analysis. Some people are doing just that. This analysis involves the manufacturers, the people like the Flight Safety Foundation, the FAA, and a number of other people. Thus, the data that is on the computers is public information. Insofar as special runs are concerned, upon request from government agencies and non-profit organizations we will, as a matter of practice, do our best to actually make separate and expeditious runs. For obvious reasons, we cannot make such an offer across the board to the profit making organizations, although, so far at least, we have also been able to honor many of these requests, even though the priority is usually much less. If you were to visit us, however, and thus see the kind of material that is available, the need for special runs might actually disappear.

One further point on the subject of computer data. Some of you may remember Mel Goff, who was a predecessor of Bobby Allen and myself as director. Mel frequently stated, "Be sure of your statistics before you distort them." This is our motto, too.

Fourth, concerning occasional errors or uncertainties in any of our reports, particularly in the general aviation field, where you are to a great extent limited to a single investigator, there can no doubt that some inaccuracies exist. When in fact they do, we, of course, would like to know about it. We have the mechanism to correct it at any time. There is hardly a week that goes by that we fail to get a request from somebody to change probable cause for one reason or another. The request may be allied with litigation, though more often than not it is allied with a bereaved family member who wants to clear the name of the party who's reputation might be damaged. From the standpoint of the Bureau, if it is merely a matter of depth of the investigation, we won't accept errors in fact, i.e., the facts of the case. Quite often, however, because of the

expediency of the situation a person does not get into it as deeply as he'd like. In other words, our criteria for how deep you go into an accident is to provide information so that preventive action can be taken. Thus, if in the opinion of the investigator and the people again who quality controlled his reports, the reports seem to generate the kind of practical action that can preclude that kind of accident from happening again, the investigator will stop his investigation at that point. So I say again, if we do have errors in the factual portion let us know. We will be more than happy to try to change it. I might add that I don't think that the minimum personnel that we have trying to do our job is the total answer. I think the basic job of investigating an accident is not an exact science. Errors are going to be made. Although we try to keep them to the smallest minimum possible, I am afraid that the situation is going to get worse before it gets better, because of the rapid growth in aviation and the corresponding lack of rapid growth in personnel thus changing our mission. We can't be all things to all people. If we are not given resources, our only recourse is to change the mission. What would happen if NTSB arbitrarily said they were not going to investigate 50 per cent of the fatal accidents in civil aviation? Although I am not implying that this level presently exists, if over the next several years, the trend continues, the concept of NTSB investigation of these accidents will be out the window. We are studying this problem, trying to figure out where we can within the assigned task we have, most efficiently apply our resources within our assigned task. We should be able to keep up for a while, but looking at the overall economy and the mood in Washington, I am positive that some changes are going to have to be made. I do not think it is quite as simple as delegating more accidents to the FAA. The FAA is another Federal agency that will have to obtain the people to investigate if we fail. We must come up with a new scheme. In any event, towards the middle of this year, we ought to have a scheme worth discussing, but we are looking at this problem quite openly right now.

MR. GERALD MAYO: This question is for Mr. Miller. Perhaps we could use the plus service that Col. Burton suggested, but it appears to me that there are materials that are not within the public documents area of your report. One of them may be one that Mr. Foreman mentioned, those which were left out because they appeared to be either irrelevant or not important to the accident may be one, as Mr. Foreman mentioned. The other, which concerns my question, is that it seems that there may be some areas where information has been collected by the NTSB which became confidential in nature. Is this true, is there any way we can get this information, and how can we get the material that you consider to be irrelevant that's not in public documents available to attorneys?

MR. C. O. MILLER: Answering in the general sense first, and coming back to the confidential material in a moment, we have internal NTSB orders which define the interpretation of the Freedom of Information Act, which really is behind any authority as to what we do here. This interpretation is a matter of judgment and therefore subject to a lot of discussion. On the one hand, certain things are clearly factual; others are clearly analytical. There are a number of situations, however, that fall in the middle, and all that can be done is to try to put them in the right stack. I can only tell you that we have a specific document. I'm sure that if you ever wanted to come and see us sometime we could show you exactly what we're talking about in this regard. As I have discussed this matter with Fritz quite often, I have heard him make one comment that makes a lot of sense. I don't mean to sound impudent, but I don't believe you can expect us to conduct your investigation for you, fully at least. Suppose there was a document belonging to someone who had investigated the case. It would seem incumbent on someone outside the Board to try to find this rather than for us to have it for you when you came looking. In other words, we are not going to be repository for all the various investigations that take place in a given

accident, especially where the same ground is covered in our own investigation. I think a lot of what you're talking about falls in this category. Insofar as the more "boiler-plate" matters are concerned, i.e., test lab reports, etc., they invariably are placed in the public records. Once again, if anybody can be specific concerning something which you have reason to believe is in the non-public file, and you think it ought to be in the other, there is a mechanism readily available for transfer. Namely, address a letter to the Board. There will be cases where the Board will review this material and suggest that it be made public. There are other things, however, which won't be made public. It's about as simple as that. Now in matters of confidentiality, here again we can point to certain documents, both formal rules of the Board and internal orders which are addressed to this point. I can only say that it is a rare case indeed where we ourselves are involved in this sort of a situation. I don't think the degree of confidentiality that we honor is any different than any other type of business whether it be a newspaper or a manufacturing organization or anything else. As a general policy, we do not believe in having confidential communications as a principal way of doing business. Again, as the need arises I can show you specific documents in this regard which are issued within the Board.

MR. GERALD MAYO: In military investigations we frequently hear all kinds of promises of confidentiality. *For example*, we tell the witnesses that the information we give them will be kept strictly for the clients' safety. This type of theory, is very rarely used in your investigations, according to your statements.

MR. C. O. MILLER: That is correct. It's rarely used. I don't mean to suggest that I would recommend throwing that theory out entirely because in my personal experience I think that the potential for confidential communications in that type of situation is more appropriate than the act of communicating confidentially. It's a matter of building confidence in the people with whom you talk that private conversations can be arranged if the need really arises. There have been cases where this technique has been very valuable. I am from the school of thought, however, which basically believes that the overall needs of all parties, including litigants, are far better served if this information is made available for all to see. I want to make this reservation, however: there are cases where valuable accident prevention information is gained only because of the ability to communicate confidentially. As Fritz said yesterday, when this matter arises it is a matter of Board practice to review and approve such activities.

MR. NED GOODE: If in fact there is occasion where there is a confidential document or documents in the file, and one of the members of this audience were to write to your office requesting it, first, is there in fact such a document? Second, without revealing its contents, would you describe the class or category involved; would there be an affirmative response?

MR. C. O. MILLER: There would be a response.

MR. NED GOOD: Would it be a favorable response?

MR. C. O. MILLER: It would be a response from the office of our General Counsel most likely.

MR. NED GOOD: Some of us have pondered filing a request with the court for a commission to issue interrogatories to the National Transportation Safety Board or the FAA asking questions as follows:

(1) Do you have a file pertaining to this accident? Yes or No.

(2) Is that entire file available publicly? Yes or No.

If it is not, naturally you would follow the directions of your lawyer, but can you give us an opinion as to whether we would have to go further via freedom of information or whether you think we would get the answers.

MR. C. O. MILLER: I think I could give you a form letter response, quite frankly, because if I correctly understood your comment a moment ago that the answer is that you have certain types of information in this public file, then you have other types of information in a non-public file. The interpretation of our

General Counsel at the present time is that these are very well defined categories. Thus, that is why I think I could answer your question by pulling a form letter out and sending it back to you.

MR. NED GOOD: Would you also indicate for us the class or category of documentation that is in the confidential file?

MR. C. O. MILLER: I hate to hear you use the word "confidential." The word implies a secrecy. It isn't secret at all. Internal memoranda pertaining to an accident is exactly the same kind of information that any business organization retains as internal documentation. For example, we put out a status report between the Bureau and the Board within a couple of days of the accident. We may have at the time that we issue a preliminary report, 4 to 6 weeks after the accident. By the time we have already formed opinions on the major areas of possible causation. These opinions are communicated in a "for official use only" type communication. This type of communication in our view is well within the statutes of the Freedom of Information Act.

MR. JOHN MARTIN: But when you're discovering a co-defendant like an airline, the government applies a different rule.

MR. C. O. MILLER: Not me.

MR. JOHN MARTIN: The government does because they expect all those interoffice memoranda to be public and to be discovered, and they do not accept any confidentiality. How can you make that distinction?

MR. C. O. MILLER: You are getting the wrong eye on this question. I'll assure you. I can only tell you that this is the way things are. If anybody wishes to test this, have at it. I'm all for it. I'm operating under a certain group of rules in this regard. If their rules are unfair, then somebody ought to test it and see what happens. I would be surprised if they would change, however, because I know this thing received quite a going over at the time we set up the order.

MR. DAVID ALEXANDER: I want to ask Mr. Miller if there are any distinctions whatever, and if so, what are they, between investigative procedures, record keeping and making records available in ruler craft as opposed to fixed wing?

MR. C. O. MILLER: No.

MR. JOE BARTON: This morning somebody said that you would not let the attorneys at the site of the accident. Do you feel that the attorney has a role at the site of the accident, and if so, what is it?

MR. C. O. MILLER: First, let me tell you what it isn't. The attorney is not and would not be designated a "party" to the investigation. The "party" is the person who participates in the investigating. I think it's safe to say that the attorney's role at the scene of the accident would be an "observer," at best. An "observer" as you recall is somebody who can be led by one of the investigators, very much the way we try to lead newsmen around at the scene. In other words, we have no objection to people coming out and looking at the scene in a general sense. However, this, to a great extent has to be at the discretion of the investigator in charge, because he has very many things to do. Somebody who is curious at this stage of the game is going to get a lot lower priority, I think, than some of the other activities. We try to leave this to the discretion of the investigator in charge as to how far he can go in taking these so-called observers, or having them around at all. I repeat, however, as a basic policy of the Board, given mainly to our field people, *when you can release factual information, release it, and make it available to people.* All we ask is that people bear with us and give us a chance to do the basic investigation job. Then let's set up a particular time where factual information will be provided orally or in writing as the case may be.

MR. JOE BARTON: I guess that puts us in our place, as lawyers. However, when you say you have to make the information available, you make it available at a pre-hearing, for example. At the hearing, only interested parties are there, so you are not really making the information available to the public.

MR. C. O. MILLER: It is a matter of timing, I think. The same information

that is made available at the pre-hearing conference is also made available at the hearing itself, a couple of days later, with a lot of other information. It's also synthesized in a post-hearing report, usually about 10 days after the accident. Therefore, you are correct to the degree that maybe somebody sees one of these reports a day or two ahead of time. But, I think it is a matter of that kind of timing difference and nothing else.

MR. JOE BARTON: It was said earlier that the NTSB is receptive to outside recommendations, but unless you know what is going on, you can not make any recommendations about further investigations before a public hearing with reference to items you might like to look into before the public hearing, unless you are a party.

MR. C. O. MILLER: Again, I think it is a matter of timing. I said before, in the major cases, we don't have the people to do it in all of them. We try to make factual evidence available in written form as soon as we can feasibly get it out. One of the reasons for this preliminary report at the 4 to 6 weeks period is so that people who otherwise might not have an interest, either legally or from an accident prevention point of view, can see it, and if they have anything they want to make certain that we are looking at, there is time to tell us. This is the mechanism of the major cases.

MR. EUGENE JERICHO: I would like to pose this question to Walt Maloney because of his vast background with the Department of Justice in federal tort claims cases. We have heard at great length about government witnesses and personnel, who can not express opinions in any regard under section 1441. When the government becomes one of the target defendants through the Federal Tort Claims Act, section 1441 will not allow an answer to a question concerning opinion testimony. This type of situation seems to be different, i.e., when you're the target and he's the man with his hand on the lever. What have you found in practice that the court's attitude is on these kind of questions?

MR. WALLACE MALONEY: Where the government is involved in the case I think it's a whole different ball game. It has been my policy to permit questions that tested a man's ability in the area that he was being questioned in. I don't think that any judge would permit an objection to the question when the United States is the defendant and the question goes directly to his ability in the area in which he was working. As to questions like "what do you think caused the crash," the judge would sustain the objection.

MR. NED GOOD: We have had two experiences where a government employee such as just described was barred from giving the opinion testimony. We filed a motion to compel an election and the court indicated that either it would allow answer within a given period of time or that individual would be barred from expressing an opinion. If, in fact, he is the person who you want to use to express the opinion that is favorable to you, the government doesn't really care if his opinion is barred. It does, however, focus in the problem a little further.

MR. DONALD COON: I'd like to ask Mr. Good and Mr. Maloney what techniques and methods they use in developing the evidence in the state of the art in design defect cases.

MR. WALLACE MALONEY: The real problem is how to develop the state of the art at a given time. As soon as the airplane is on the drawing board, some of the material is obsolete. The best recommendation I can make is simply going back to the certificate data, which I feel should be the basis upon which a judgment is made whether or not the particular aircraft involved met the state of the art at that time. No court that I know of has permitted that type of evidence in the record to show the standard, but I would be in favor of it.

MR. NED GOOD: A book entitled *Fundamentals of Design* by Asimow[1] tells the ABC's of design of not only aircraft but everything. Some of the elementary concepts are used across the board. I think it's a tremendous book for lawyers to read because it's not too technical, it is very helpful in showing what one should

be able to foresee. The plaintiff's lawyer supposedly likes to show what happened after the accident, but the objection given to him is that since he knows *now* he therefore should have known *before*. This book offers some real insight into the problem.

MR. JOE BARTON: Isn't state of the art really nothing more than a fancy way of saying "reasonable care," i.e., whether the engineer used reasonable care at the time he designed? I think state of the art is a fancy term that manufacturers try to hide behind.

MR. NED GOOD: No, they don't. The Northwest accident out of Miami provides an example. In that case tried by Jack Caneldi in Chicago, they brought in subsequent changes that the manufacturer had made to prove that the stabilizer could only put 3.5° nose down, where it had been 4.44°. They should have judged by the information that was available at the time it was built or at least the state of the art at the time the accident happened, and not post-accident study.

MR. JOE BARTON: But, a lot of the post-accident information is merely to demonstrate that this information was known before hand and the engineers should have taken it into consideration when they designed the machine.

MR. C. O. MILLER: This phrase, of course, has been thrown around pretty loosely in our view by a lot of people, not necessarily in the legal field. "Art" to the engineer is a three-headed animal in the real world. Those three heads are performance, cost and schedule. Technical capability to produce in a highly safe, effective and reliable manner can be learned at a university, but in the real world an engineer is suddenly something that the engineering schools really didn't spend much time telling him about.

MR. NED GOOD: State of the art really means what is reasonably forseeable in the exercise of ordinary care. Whether making a mouse trap or anything else, there are certain standards which beginning engineering students learn in thinking about design problems. This is one reason why I recommend the book.

MR. BANKS WILSON: Two things strike me concerning the question why NTSB employees are not allowed to answer as to opinions and conclusions. One fundamental reason is that you don't want to dry up your source. You're trying to find out the truth as it actually happened. Possibly, you might feel that if it was disclosed to you in confidence you might not be able to get that same confidence level again from a particular manufacturer. But, in cases where this is not the instance, and since the expert witness will be deposed anyway, why not allow a foundation to be laid for the plaintiff's or defendant's experts, and thus give an opinion or a conclusion?

MR. C.O. MILLER: I'm afraid I'm going to have to take exception to tying together the so-called "confidential communication" and opinion of the expert. As I said before, confidential communication is not our modus operandi. It's there in very rare occasions where the situation warrants it, but basically that is not what we do. I'm not about to say that people won't come up and say, "I'll tell you something if you forget the source." There are all grades of confidentiality, but basically this is not our modus operandi. We want to get hard factual evidence to support whatever goes on. In response to your particular question about why do we object to our personnel giving opinions, we have 100 investigators, and some of these people are qualified to give expert opinion in a broad area; others are qualified to give expert opinion in a very technical area. By the same token, there isn't a one of them that doesn't have somebody else probably in the organization's discipline who's mission is fact finding. I submit that you could create some wholesale chaos in undermining the basic process of quality controlling the output of the product if you let everybody from the bottom up state what he thinks happened in an acident. After all it is the five members of the Board who determine probable cause of an accident as investigated by the NTSB. That's a bona fide law. I think you can readily see the chaotic situation that would develop if people

at varying levels of expertise were allowed to be deposed. I'd be interested in the comments of the members of the Bar on this subject. Is this an unreasonable position to take?

MR. JOHN HILL: I think it's a very good rule. I can conceive of a situation where it could be tragically wrong if a fellow just happened to be the only person that could give an opinion. I think we have to live with that isolated possibility, however, and agree that it would create a tremendous problem, and we'd lose more than we'd gain if we changed the rule.

MR. NED GOOD: If you were adequately budgeted and you had ample or even surplus personnel, there might be an opportunity for different considerations, but you couldn't possibly service this right now, could you?

MR. C. O. MILLER: I didn't even mention that. At the present time as you heard before, the use of our people for depositions as they've been used is a serious imposition. When we lose a man for 4 or 5 days in a row there is no question that it hurts us.

MR. TOM DAVIS: I agree 100% that the NTSB investigators should not be required to express an opinion on what caused the crash. But I don't think there are many lawyers who ask them that. Where we run into trouble is where we ask the investigators, "Did you find any evidence to indicate that the engine was developing power at impact?" Our answer is, "Don't answer, that is an opinion." I submit that might be an opinion if I were to express it, but an engineer, for example, knows enough that it's really almost a fact to him because he can look at certain designations and therefore know the propeller was developing power.

MR. C. O. MILLER: Some can do it and some can't. For example, we might have one of our investigators in charge from our operations branch. He has piloting background, and he's certainly been around investigations for a long time or he wouldn't have the IAC title. Thus some people would classify him as an expert. If you ask him whether the engine was developing power at impact, there is an argument whether he is an expert or not. Our investigators are not a one man operation, but rather a team effort either in the field or in the review of the report itself. The assumption that there exists a person who can answer all the differing types of questions posed to him is invalid. Arguably, it is confusing if large team investigations and general aviation are mixed together. In the general aviation case, however, the accident report comes back from Washington, and its goes through people who are specialists as best can be derived by the analysis group. Thus, even in the field phase, you know it's "A" man out there. You may have many eyes looking at that report from many points of view. I suggest you would not know who you'd want to depose for this point anyway. It could get so complex that I don't know what the overall solution would be.

MR. TOM DAVIS: I suggest that this prohibition be against opinion only. It's against the opinion as to the ultimate or probable cause and not to whether the flaps were up, etc. Depending on who happens to be the government attorney that's supervising the depositions, you can ask one question one time and it's fact, and the next time you ask, you get an objection because it's opinion.

I strongly suspect that the underlying reasons for these objections are the fact that the man doing the questioning may not recognize the limitation of that particular individual's capabilities, and that's why you might find this variation in response. Suppose an investigator on the power plant committee submits a report which concludes that power was developed at impact. Why can't the investigator answer that he found evidence?

MR. BOB ALLEN: First, I don't think it's necessary because I think that the information that you're seeking is already contained within the basic factual report. Second, the prohibition against the particular individual giving opinion testimony as the NTSB employee. In major catastrophic accidents there are probably 400 or 500 people. There are, on each power plant, a representative from just about every part that participates, and you can get to him. In every accident

investigation that the NTSB man goes out on in general aviation, there is also an FAA man that is available. I freely offer him.

MR. TOM DAVIS: You have the same prohibition against him giving an opinion. It does not do any good to ask the FAA whether there was any evidence that power was being developed at impact.

MR. C. O. MILLER: Am I hearing again that a subject germane to the cause of the accident was not identified in the basic factual information which became available? This is the thrust of Bob's answer just a minute ago. If our people are doing their job at all, there should be factual information available from which you could draw your own conclusions one way or the other. If that factual information is absent and it is germaine to the cause of the accident, then I think you have a legitimate complaint about the quality of the investigation.

MR. ANDY YATES: My first question is directed to Mr. Miller in regard to the data acquisition of the accidents, specifically those in which the FAA has been designated as the investigating agency. As I understand it, the incidents that are investigated solely by the FAA are not generally reportable to the NTSB's accident data acquisition group. Is that correct?

MR. C. O. MILLER: That is correct. There are certain classifications that we get into automatically, i.e., certain types of fires, etc. However, there is a lot of so-called "incidents" which are not. I think this is one of the problems we have in civil aviation accident prevention today. I don't think we have a good handle, if I may put it that way, on the entire thing that you and I would communicate as being "incident."

MR. ANDY YATES: The second problem that I would like to bring up is the matter of proprietary information by the manufacturers of aircraft. There have been some instances where we have tried to obtain information which we felt was highly valuable to us in making an investigation of an incident where, for example, the manufacturer claimed proprietary privileges. This information was then not made available to us. This has been one of our big problems.

MR. LLOYD ERICKSON: Mr. Miller's remarks concerning the difficulty of formulating adequate teams to cover everything is directed particularly to general aviation areas. If you consider those parts of the country where there happens to be an aviation adjuster who is actually knowledgable have you ever considered making him a part? This could be done logically because he is really the financial representative of the owner, and the one with expertise by knowledge of your airline team.

MR. BOB ALLEN: We couldn't do it because there's a procedural regulation that specifically precludes a representative of either a litigant or an insurer.

MR. LLOYD ERICKSON: I assumed when I asked whether you considered doing it, that the consideration would include removing the impediment if you thought it was a desirable objective. So, simply saying that a regulation precludes it right now doesn't answer the question.

MR. BOB ALLEN: I'm presently engaged in a special project in which we are looking at the total number of accidents that the Board investigates and then anticipating that the work load will increase with the next few years to the point where the people available will not be able to accomplish the job. My job is to attempt to come up with some kind of a plan to present to the Board that would: (1) identify those accidents that we should not look at, (2) identify those accidents that could be investigated by some other organization or entity and, (3) try to determine what other organization or entity could best investigate these. At this point, I really don't know the answer.

MR. JOHN MARTIN: I don't think you want to appoint the insurance industry any more than you want to appoint the American Trial Lawyers as the exclusive deligees to do investigations in this matter. There might be some people that would think that the investigation might, at least, be looked at with some less than neutral eyes.

We've heard a lot about interrogatories and some of the victims of them. In your opinion, Mr. Good, do you feel there's anything that is truly the work product of the attorney, or truly material developed in contemplation of litigation and thus immune from recovery?

MR. NED GOOD: I'm a believer in liberal discovery learned from the old school where we once thought that the fellow found as a witness, was work product and therefore secret. If I found a witness, you had no right to even know who he was. We have learned over the years that witnesses don't belong to anybody; they belong to the community, because they have knowledge that should be shed on the open table. Balancing that problem, of course, is the question of to what extent should the lawyer be able to develop the unfavorable aspects of his case. I don't think that the end result of justice would be hurt if we did not have an attorney work product provilege. But, there had to be some basis for showing you couldn't get it by reasonable means; i.e., you shouldn't sit in your office and let me do all the work and then say "Ned, would you mail it over to me?" I don't, to the extent that a privilege conceals, depress and make undisclosable information relevant and material and which sheds light on the truth. I don't think that we as lawyers have a right to keep it in a safe.

MR. JOHN MARTIN: Are you prepared then to let the defendant examine your expert and take this deposition before the trial?

MR. NED GOOD: Yes, sir. I know you can do it right now in California. I'm a stronger believer in the right of either litigant to examine thoroughly the adverse party's expert than I am of the right to examine a lay witness, because experts seem to root for the home team, and I think there's more need to carefully analyze their opinions and the factual basis. Witnesses do not have the deep-seated instincts, at least based upon financial rewards, to want to help one side or the other.

MR. VINCE GLORIOSO: If your fears and expectations of the pending dangers to the NTSB, its function and commission, are founded, and if John Hill's great praise for the work of the NTSB is supported, then I believe that the breadth, depth and quality of your work is a matter of more than just passing mention that we're giving it here. I would like to know what you think we, as private attorneys and as representatives of industry and commerce, can do to save the NTSB.

MR. C. O. MILLER: I hope we're not lost souls yet. I can only tell you that if we had any real good ideas along this line they would have been part of my speech to begin with. We've tried everything we know to bring people to recognize what has taken place. We have fewer people in this bureau of aviation safety today than any year since 1962. We have actually suffered a decrease in personnel over the past three years due not so much to allocations as a lot of the stop-start-stop type things that they do when budgets aren't approved according to calendar, etc. So this year's allocation of people is now up to 185. The 185 figure allocation, if my memory serves me right, is within four or five of what we had in 1962, despite the fact that aviation has grown somewhere between five and ten per cent. These facts have been clearly shown to the Congress and the Bureau of the Budget. However, they have problems, too. In the final analysis we do what we can with what we have. If you detect insufficient accuracy or completeness of our work product, you're not going to hurt my feelings if you tell somebody about it. I think to a great extent, this is what happened in the past in not only our agency but in several others. Although I'm not asking for a flood of letters to Congressmen saying our people don't know how to investigate accidents, there is a Bureau of the Budget, Administration and Congress who decides what we do from year to year. We will continue to lay before them as accurately as we know how what we can expect in accidents; that's as far as we can go, and I don't know if it's appropriate for me to suggest to you to do anything specific.

MR. NED GOOD: There is a doctrine of law that says if a defendant has a

case fully tried and he loses it, plaintiffs who are litigating facts arising out of the same accident may get the benefit of that loss by having it held that the defendant is collaterally estopped from the denying that he is at fault in the same accident in your law suit in another court. There are differences in the United States as to when the doctrine of collateral estoppel applies. The doctrine of collateral estoppel applies only to the question of finality. In federal court finality of judgment attaches at the time that the motion for a new trial is denied, even though thereafter the case is appealed. In most state courts, however, finality only attaches at the time the last appeal is finalized. There is a case in the United States arising out of a major aircraft disaster in which an air carrier was held negligent. The motion for new trial in the federal court was denied; meaning that finality of judgment had attached. Thereafter, other courts accepted that as final and held the defendant liable in those cases and proceeded to allow the case to be tried only on the question of damages. In the court which originally denied the motion for new trial, the defendants brought their piece by way of a nominal discount on the judgment and then by stipulation by the parties got the court to reverse and vacate its denial of the motion for a new trial, beyond that normally considered to be the time period retention of jurisdiction. Thus, all cases who are predicated upon finality in that court now have the open question as to whether or not there is any judgment at all. Therefore, care must be exercised in relying on the doctrine of collateral estoppel because the finality may not be there.

MR. TOM DAVIS: If, in fact, the airlines can't get adequate insurance for the 747 and therefore that fact given as a reason why we have to have $100,000 death limitation, isn't this something that they could have thought of and planned in advance before they started buying and flying them? If the same problem exists wouldn't it also exist where the manufacturer can't insure against them? There is no suggestion that this limitation applies to the manufacturer.

MR. EUGENE JERICHO: I can't answer that exactly. One solution, of course, is to put the limitation on a voluntary or a mandatory basis, requiring the passengers to protect themselves additionally if they feel additional protection is needed by some form of accident life insurance. This depends on the individual's needs; of course, the single men need a certain amount and if you've got 18 children at home, you need a different amount. That doesn't directly answer your question, but it seems to me that it is a matter of economics of running an airline and how long will the airline be able to exist under the ever increasing cost, and how long will society stand for it in the form of whatever they have to pay for their tickets, or for the airplane equipment.

MR. TOM DAVIS: I just put the limitation when you're flying the 747 and publicize it. People can either fly on the 747 with limitation, or take a 707 where they don't have it.

MR. JOHN MARTIN: I don't think we should go away from this meeting with any definite understanding that the insurance cannot be placed. Pan American, American, and TWA, the 3 major carriers that are flying the 747's, recently have been able to place all the insurance they wanted. From what I know of what's going on in the insurance industry, there's no panic in the industry. They are perfectly confident that they will be able to place this coverage. In addition, there is ATA insurance, and I see that the CAB has approved the concept. The next thing is for Switzerland to approve a scheme and if they do then it will be up to the airline to see whether they'll be able to finance this separate insurance. This separate insurance is through the bank guarantees, which is the theory they're using. This is an entirely new concept in insurance. There will be no reserves; there will be bank guarantees by the airlines who participate. In the event of a disaster, whoever is handling the claims will have to call on these bank guarantees which will mean the airlines will have to pay their portion of these risks. I don't think, however, we should have the idea that there's any panic,

I've been to London, not underwriting, but on the claims end of these matters and they all feel that this is something in the capacity of the insurance industry. Although, after the first disaster, they may change their minds, right now I think that's the feeling.

MR. PETER REDMOND: Absolute liability for the airline or no liability limitation for airframe or component manufacturers, is a different question. A point which I don't think a lot of people have considered is that if a passenger makes a claim against an airframe or a component manufacturer, to what extent he have rights to make a third party claim against the airline? Is the limitation going to prevent him from recovering under proper circumstances? Or being indemnified by the airlines? If you allow them to do this it would seem that you're letting them get around this limitation and the airline is right back in the same point with the same problem. If you don't allow them, how can you possibly not place a limitation on the liability of the manufacturer or either airframe or component, where it's the airline who has had the exclusive control of the item for as many as four to ten years. It is an interesting aspect for which I have no solution.

MR. JOHN MARTIN: Most of the manufacturers are Americans with lots of money. I think the foreign airlines are one of the big proponents of limitation. They are certainly the ones who have always supported the Warsaw Convention, and they shudder at the thought.

MR. C. O. MILLER: As some of you know, I've been trying to meet with members of the legal profession for several years to affect a better understanding between those of us in the accident prevention business and those of you in the legal profession. I can only say I'm gratified at the result. As a matter of fact, when Lee Kriendler gave an example of something which maybe you don't fully realize is exactly a product, I think of this kind of open discussion between those of us in the accident prevention and those of you whose objective from perhaps the same basic facts as another thing called social justice. But when Mr. Kriendler talked about the fact that on the 747 they had conducted some very exotic and extensive analyses aimed at producing a better product, at the risk of confusing you, this technique is known as "faultry" analysis. I kept suggesting to people they ought to quit calling it "faultry" and call it "cozzeltry," because I can see it now, you'll get one of these things in a courtroom someday and say look at all the faults they found back there and they didn't do anything about them.

But what Mr. Kriendler didn't tell you, is that these techniques of analyzing the product well ahead of time really didn't start with some lawyer saying why don't you get better documentation. They started back in the early 1960's when a lot of us were looking for a better way to prevent accidents through design. And indeed it was in 1965 at a System Safety Symposium which was sponsored by Boeing at the University of Washington that a lot of the philosophy that ultimately found its way into the 747 was expressed in front of a lot of Boeing people. And I think therein were the seeds of the product that Mr. Kriendler referred to as being of benefit to the legal profession. So I guess all I'm really trying to say is that I think the more of this dialogue we have, the more we can mutually exchange ideas of this kind, the better I think both of us can do our jobs.

End of Friday afternoon panel discussion